QUESTIONS PRESENTED.

Whether judicial enforcement of petitioner's dismissal by the Civil Service Commission constitutes action by the state so as to enable petitioner to raise the constitutional question of an unreasonable search and seizure and if so, does the exclusionary rule of *Mapp v. Ohio,* 367 U. S. 643 apply in a hearing before a municipal civil service commission?

STATEMENT.

Prior to her dismissal, petitioner had been employed as a Junior Clerk in the Division of Inspection of the City of Toledo, Ohio. She was charged with engaging in gambling during working hours and using the telephones in the Inspection Division offices to place bets on horse races with "bookies." Pursuant to Civil Service Rules, a hearing on said charges was held before the City Manager, whose decision was to dismiss petitioner from her position in city employment. Upon her appeal to the Civil Service Commission, a hearing de novo was had and the Commission affirmed the decision of the City Manager. The decision of the Civil Service Commission was affirmed by the Common Pleas Court of Lucas County, Ohio, Appendix B, *infra,* page 9 and by the Court of Appeals for Lucas County, Ohio, Appendix B, *infra,* page 11. An appeal as of right was denied by the Supreme Court of Ohio for the reason that there was no substantial constitutional question presented, Appendix B, *infra,* page 12.

A portion of the evidence in this matter included several cards taken from the top of the desk which petitioner was using in her employment. These cards contained notations as to the placing of bets on races with "bookies." The notations were interpreted by Officer Daniel J. Perzynski

after first being qualified as an expert witness in this field. (See Record, 105.)

Captain Ted B. Kwiatkowski, head of the Police Crime Laboratory, after first being qualified as an expert (see Record, 144) testified that hand writing on the cards was that of the petitioner.

REASONS FOR DENYING THE WRIT.

Petitioner contends that her constitutional rights were violated in that there was an unreasonable search and seizure in the taking of certain cards from her desk top in violation of the Fourth Amendment of the Constitution of the United States, Appendix A, *infra*, page 8. Petitioner relies on the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643; *Boyd v. United States*, 116 U. S. 616; and *Elkins v. United States*, 346 U. S. 206; all of which are cases involving the violation of a penal statute.

It is further urged by petitioner that because of judicial enforcement by the Courts of her dismissal that this constituted state action in violation of the Fourteenth Amendment to the Constitution of the United States, Appendix A, *infra*, page 8. In support of this position the petitioner relies on *Shelley v. Kraemer*, 334 U. S. 1, and *Barrows v. Jackson*, 346 U. S. 249.

The *Elkins* and *Mapp* cases dealt with entirely different situations than the case before the Court. The former, that evidence obtained by illegal search on the part of state officers was inadmissible in federal criminal trials and the latter that evidence secured by illegal search resorted to by state officers was not admissible in the state courts. The *Shelley* and *Barrows* cases, *supra*, dealt with enforcement of restrictive covenants and it was held by the Courts that restrictive covenants could not be enforced against negro

purchasers because this would constitute state action in violation of the Fourteenth Amendment of the Constitution of the United States.

In order to raise a constitutional question in the case of an unreasonable search and seizure some intervening action by the state must be found. In reliance upon the doctrine of the *Shelley* case, *supra,* the petitioner contends that the giving of evidentiary status to certain cards by the Courts did constitute state action under the ruling in the *Shelley* case. To give merit to this reasoning would be to extend the already "strained concept" of state action laid down in the *Shelley* case. The Court has inferred that it would limit the application of the *Shelley* doctrine to cases involving racial segregation. See *Black v. Cutter Laboratories,* 351 U. S. 292. The Court not only has limited the *Shelley* concept of state action but has even narrowly construed the federal constitutional concept of unreasonable search and seizure as shown by the decisions of the Courts in *Frank v. Maryland,* 359 U. S. 360; *Eaton v. Price,* 360 U. S. 246 and *Abel v. United States,* 362 U. S. 217. In the *Frank* case, *supra,* the Court held that a health inspector had the right to a search without a warrant. See also *Burdeau v. McDowell,* 256 U. S. 465, where the Court held that private papers of the plaintiff stolen by an individual and delivered to the prosecutor did not violate the Fourth Amendment to the Constitution of the United States. In *People v. Randazzo,* 34 Cal. Rptr. 65, certiorari denied, 377 U. S. 1000, the Court refused to apply the state action concept of the *Shelley* case to search and seizure cases.

The Courts have been consistent in holding that the *Mapp* and *Elkins* cases have not impaired the ruling of the Court in the *Burdeau* case. *United States v. Goldberg,* 330 F. 2d 30, certiorari denied, 377 U. S. 953; *Knoll Associates,*

Inc. v. Dixon, 232 F. S. 283; *Geneviva v. Bingler,* 206 F. S. 81. There is no question that the rule as to the exclusion of evidence obtained by unreasonable search and seizure in violation of the Fourth Amendment has been extended since *Burdeau v. McDowell,* but as stated by the Court in its opinion in *Geneviva v. Bingler, supra*:

> "* * * The rule, however, has not been expanded to the extent that evidence obtained by persons not acting in concert with either state or federal officials must be excluded * * *."

The scope of the Fourteenth Amendment is applicable only to state action and was not intended as a protective shield against the conduct of private individuals. *Downie v. Powers,* 193 F. S. 760; *Screws v. United States,* 325 U. S. 91 and *Davis v. Cook,* 55 F. S. 1004.

In addition to the cards containing notations as to bets made on horse races which petitioner claims were obtained through unlawful search and seizure, there was additional evidence presented. This consisted of testimony of various individuals to whom the petitioner had admitted the following:

1. That she used Inspection Division phones during working hours to place bets with "bookies." (See Record, 76.)
2. That she refused to identify the "bookies" whom she had placed bets with, but that she knew some of them had been arrested recently. (See Record, 77.)
3. When asked who the "bookies" were that she placed bets with, she replied "You already arrested some of them." (See Record, 84.)
4. Admitted that other City employees had placed bets with her and were involved but refused to identify them. (See Record, 88.)

As stated previously, the petitioner was charged with the violation of Civil Service Rules, not a penal statute. At the hearing before the Civil Service Commission a transcript was made. Pursuant to Section 119.12 Ohio Revised Code her appeal to the Courts was confined to the record as certified. This was even stipulated to by the parties. Appendix B, *infra*, page 10.

At the hearing before the Civil Service Commission there was no motion made to suppress evidence which was introduced and this did include the horse bet cards which petitioner now says were unlawfully seized. Assuming for the purposes of argument only that the law of search and seizure was applicable in an administrative hearing the contention of the petitioner is still devoid of merit in view of the fact that no motion was made to suppress the evidence of which petitioner now complains was unlawfully seized. By stipulation of Counsel the record before the Courts on appeal was the record as certified. This record contains no motion made to suppress the evidence. It is fundamental law that a reviewing court will only consider such error as was preserved in the Court below and you cannot for the first time urge on appeal objections which may have been obviated if made in the Court below.

Therefore, it is respectfully submitted that there was no invasion of the security afforded petitioner by the Fourth and Fourteenth Amendments to the Constitution of the United States as there was no intervening action by the state. Judicial enforcement of petitioner's dismissal certainly does not constitute state action within the meaning of the Fourteenth Amendment so as to enable petitioner to invoke the protections of the Fourth Amendment. An unreasonable search within the meaning of the Fourth Amendment means the right to be secure from searches

for evidence to be used in criminal prosecutions or for forfeitures. Neither of these elements exist in petitioner's case. This was a hearing before a municipal civil service commission which is an administrative body.

CONCLUSION.

For the foregoing reasons and authorities cited herein, this petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK T. PIZZA,
Assistant Director of Law,
JOHN J. BURKHART,
Chief Counsel,
Attorneys for Respondents.

APPENDIX A.

AMENDMENT IV—CONSTITUTION OF THE UNITED STATES.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV—CONSTITUTION OF THE UNITED STATES.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

No. 197,380.

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO.

KATHRYN GENITE,

Appellant,

vs.

CIVIL SERVICE COMMISSION OF TOLEDO, OHIO, *et al.*,

Appellees.

This day this cause came on to be heard upon appeal from the decision of The Civil Service Commission dismissing Appellant from her position as a Junior Clerk in the City of Toledo, Division of Inspection as of July 20, 1964, and the Court, being fully advised in the premises finds upon consideration of the entire record, the briefs and arguments of counsel, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that the decision of the Civil Service Commission be and the same is hereby affirmed. Appellant to pay the costs of this action.

To all of which Appellant excepts.

STIPULATIONS IN THE COURT OF COMMON PLEAS.

(Common Pleas No. 197,380—Caption omitted.)

It is hereby stipulated by the undersigned Attorneys of Record for all of the parties in the above captioned matter as

1. That the appeal made herein is done pursuant to provisions of Section 119.12 Ohio Revised Code.
2. That the hearing on appeal shall be confined to the record which has been certified to the Court and that the parties hereto do consent to the form of the record as certified.
3. That the parties shall file and exchange briefs prior to oral arguments on the matter which has been set for hearing by the Court at 10:00 A.M. on March 31, 1965.

JOURNAL ENTRY OF THE COURT OF APPEALS.

C. A. No. 6009.

IN THE COURT OF APPEALS

OF LUCAS COUNTY, OHIO.

KATHRYN GENITE,

Appellant,

vs.

CIVIL SERVICE COMMISSION OF TOLEDO, OHIO, *et al.*,

Appellees.

This cause came on to be heard on appeal on questions of law and upon consideration of the record and assignments of error, the Court fails to find any error appearing on the record in the judgment and proceedings of the Court below prejudicial to the rights of the appellant, and the judgment is, therefore, affirmed, at appellant's costs and this cause is ordered remanded thereto for execution for costs.

All to which appellant excepts.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO.

No. 39,989.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS.

KATHRYN GENITE,

Plaintiff-Appellant,

vs.

CIVIL SERVICE COMMISSION OF TOLEDO, OHIO, *et al.*,

Defendants-Appellees.

APPEAL FROM THE COURT OF APPEALS
FOR LUCAS COUNTY.

(April 13, 1966.)

This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

ORDER DENYING REHEARING.

(Supreme Court No. 39,989—Caption omitted.)

(May 11, 1966.)

It is ordered by the court that rehearing in this case is denied.

ORDER OF THE SUPREME COURT OF THE UNITED STATES EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

(Supreme Court No. 39,989—Caption omitted.)

(July 7, 1966.)

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 12, 1966.

/s/ POTTER STEWART,

Associate Justice of the Supreme Court of the United States.

Dated this 7th day of July, 1966.